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December 5, 2014

Honorable Tani Gorre Cantil-Sakauye, Chief Justice,
and Honorable Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

Re: *Wineland-Thomson Adventures, Inc. v. Doe 1*, No. S222624, Amicus Letter on Behalf of Global Voices Advocacy and the Media Legal Defence Initiative in Support of Petition for Review

To the Chief Justice and Associate Justices of the Supreme Court of California:

Pursuant to California Rules of Court 8.500(g), Global Voices Advocacy and the Media Legal Defence Initiative ("*Amici*") urge this court to grant review of *Wineland-Thomson Adventures, Inc. v. Doe 1*, No. S22262. *Amici* are as follows:

Global Voices Advocacy is a project of Global Voices Online, a global community of more than 800 writers, bloggers, activists, and translators, formed in 2005. The organization's website, http://www.globalvoicesonline.org/, features news stories, interviews, and editorials from authors in 167 countries, produced and translated into more than 30 different languages. The Advocacy project brings together bloggers and online activists dedicated to protecting freedom of expression online through storytelling, campaigns, and collaborative research.

The Media Legal Defence Initiative is a non-governmental organization that works in all regions of the world to provide legal support to journalists and media outlets who seek to protect their right to freedom of expression. It is based in London and works closely with a world-wide network of experienced media and human rights lawyers, local, national, and international organizations, donors, foundations, and advisors who are all concerned with defending media freedom.

This case presents an application of California's anti-SLAPP Statute, Cal. Code Civ. P. § 425.16, to a lawsuit brought against an anonymous blogger reporting on

incidents of international concern between the citizens of Tanzania and the plaintiff, Thomson Safaris, a Massachusetts company. The plaintiff's local counterpart has been subject to a lawsuit in Tanzania and investigations by the United Nations High Commissioner for Human Rights. In those proceedings they are alleged to have abused local residents, refused access to disputed land, and burned buildings and other property. Petition 10-11, 13; Appellant Brief 6-9; *see also* Alex Renton, *"Tourism is a Curse to Us"*, The Guardian (Sept. 5, 2009), http://www.theguardian.com/world/2009/sep/06/masai-tribesman-tanzania-tourism (detailing issues between Thomson Safaris' Tanzanian operations and neighboring Maasai); *Trent Keegan*, Committee to Protect Journalists (May 28, 2008), https://www.cpj.org/killed/2008/trent-keegan.php (noting an investigation into the death of a journalist who was covering this issue). The defendant blogger reported on the cases pending in the Tanzanian courts and urged readers to boycott Thomson Safaris.

Thomson Safaris sued the blogger (named only as "John Doe") for defamation, but failed to plead what statements in particular it argued were defamatory, as California law indisputably requires. *See* Complaint ¶ 8; *Gilbert v. Sykes*, 147 Cal. App. 4th 13, 31 (2007). The Superior Court and Court of Appeal, however, did not respond to this error by striking the complaint. Instead, the Court of Appeal said that court could "consider[] Thomson's showing of its ability to provide such specificity" in a future complaint. Opinion 4. This controverts prior decisions by the Court of Appeal. *See Simmons v. Allstate Ins. Co.*, 92 Cal. App. 4th 1068, 1073 (2001) ("Allowing a SLAPP plaintiff leave to amend the complaint . . . would completely undermine the statute by provided the pleader a ready escape from section 425.16's quick dismissal remedy.").

The Court of Appeal also let the complaint survive an anti-SLAPP motion without requiring the plaintiff to show that the defendant acted with actual malice,[1] in direct contradiction to the anti-SLAPP statute and years of precedent. Opinion 7; *see Robertson v. Rodriguez*, 36 Cal. App. 4th 347, 359 (1995). According to the court, because the blogger was anonymous, the plaintiff did not have to substantiate a claim of actual malice to survive an anti-SLAPP motion to strike. Opinion 7 n.4. The court reached this conclusion without making any mention of the fact that Thomson Safaris could have sought leave from the trial court to discover the blogger's identity after the anti-SLAPP motion was filed, whereupon

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[1] The Court of Appeal assumed *arguendo* that the plaintiff was a public figure, thus requiring a showing of actual malice, Opinion 7 n.4, although the Superior Court ruled that Thomson Safaris was not a limited purpose public figure, Superior Court Op. ¶ 4. Even if the plaintiff only needed to show negligence, however, anti-SLAPP doctrine still requires the plaintiff to substantiate the element of fault. *See Lafayette Morehouse, Inc. v. Chronicle Publ'g Co.*, 37 Cal. App. 4th 855, 868 (1995); *see generally Brown v. Kelly Broad. Corp.*, 48 Cal. 3d 711, 721 (1989) (articulating the differing standards of fault in light of United States Supreme Court precedent).

that court could have weighed the merits of the claim as it stood and made the decision whether to pierce the veil of anonymity.[2]

Amici are gravely concerned by the decision in this case, which allows a defamation plaintiff to survive an anti-SLAPP motion to strike with an impermissibly vague complaint and under a standard that subjugates constitutionally protected anonymous speech to a lower status than all other speech. For online speakers who write about the actions of corporations and governments outside of the United States, like the blogger here, a frivolous lawsuit could mean their economic ruin, and anonymity may be the sole guarantor for their safety. *Amici* therefore respectfully request that the Court grant the petition for review of this matter, reverse the Court of Appeal's decision, and confirm that a plaintiff's lawsuit may only survive an anti-SLAPP motion to strike if they state a facially valid claim and substantiate all elements of the claim, including fault.

I. In Order to Protect Online Speakers, Defamation Plaintiffs Must Be Required to Draft Facially Sufficient Complaints, and Failure to Do So Gives Grounds to Strike the Complaint Under Anti-SLAPP.

For over a century, courts in California have required defamation plaintiffs to plead exactly what statements they allege to be defamatory. *Haub v. Friermuth*, 1 Cal. App. 556, 557 (1905) ("The words must be set out in the complaint that the defendant may have notice of the particular charge which he is required to answer."); *accord Gilbert*, 147 Cal. App. 4th at 31 (applying this to an anti-SLAPP motion to strike, and noting that "[i]f the pleadings are not adequate to support a cause of action, the plaintiff has failed to carry his burden in resisting the motion"). This serves two important functions in defamation actions: it allows the defendant to prepare an adequate defense to the claim, and it allows the court to properly frame the sensitive calculus required when examining allegedly defamatory statements. *See Vogel v. Felice*, 127 Cal. App. 4th 1006, 1017 n.3 (2005) (stating that, when plaintiffs "fail[ed] to clearly and comprehensively specify statements by which they claim to have been injured," the court "would be

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[2] *See* Cal. Code Civ. P. § 425.16(g). An attempt to discover the identity of an anonymous online speaker is a critical event in speech litigation, and in order to recognize the First Amendment's special sensitivity to anonymous speech, many states, including California, have developed a requirement that a defamation plaintiff state and substantiate a valid claim before allowing discovery of a speaker's identity. *See generally Krinsky v. Doe 6*, 159 Cal. App. 4th 1154, 1167 (2008); *Dendrite Int'l, Inc. v. Doe 3*, 775 A.2d 756, 768 (N.J. App. 2001); *Doe v. Cahill*, 884 A.2d 451, 460 (Del. 2005); *see also Paterno v. Superior Court*, 163 Cal. App. 4th 1342, 1349 (2008) (analogizing the anti-SLAPP consideration for discovery to that in anonymous speech cases). Because it appears Thomson Safaris did not attempt to seek discovery after the defendant filed anti-SLAPP motion to strike, *see* Answer to Petition 8, the trial court did not have the occasion to apply *Krinsky* and determine whether to allow such discovery. But that does not justify a ruling that excuses the plaintiff from having to carry its burden under anti-SLAPP law.

justified in disregarding any evidence or argument concerning statements" not set forth in the complaint).

Failure to plead statements with particularity can lead to unnecessary confusion, obstruction, and delay in defamation litigation and generate the very "abuse of the legal process" that concerned the California State Legislature when it chose to enact the anti-SLAPP statute. Cal. Code Civ. P. § 425.16(a). The mischief that can follow from an improperly-plead complaint is apparent from the facts of the case at bar. Because the plaintiff never defined what statements were at issue, the parties and courts were lost in a search for any statements on the website that (a) are not constitutionally-protected opinion, (b) are not protected by the fair report privilege, and (c) appear to be substantiated false statements of fact. *See* Opinion 6-7. The courts below could not frame the inquiry properly, as the plaintiff never made clear what statements were actually in dispute.

Requiring a defamation plaintiff to identify what statements are defamatory before going forward with litigation avoids this unnecessary confusion. In cases where anti-SLAPP applies, it is entirely appropriate to strike a plaintiff's complaint on this point alone. The California State Legislature crafted the anti-SLAPP statute to prevent the plaintiff from going "back to the drawing board with a second opportunity to disguise the vexatious nature of the suit through more artful pleading." *Simmons*, 92 Cal. App. 4th at 1073. That a plaintiff is unable to identify a defamatory statement serves as a strong indication that there is no valid claim.

Guarding against vexatious lawsuits is especially important for online journalists reporting on the activities of governments and corporations overseas. Such writers are often lone individuals trying to cover gaps left due to the shrinking number of institutional news organizations with international bureaus. *See* RonNell Andersen-Jones, *Litigation, Legislation, and Democracy in a Post-Newspaper America*, 68 Wash. & Lee L. Rev. 551, 564-68 (2011). Their reports, by their very nature, often include assertions of fact drawn from litigation and other public proceedings, like those made here. Individual writers are also especially vulnerable to censorship though the filing of frivolous or vexatious complaints. *See id.*; Jeffrey P. Hermes & Andrew F. Sellars, *The Legal Needs of Emerging Online Media: The Online Media Legal Network After 500 Referrals* 16-17 (2014), *available at* http://www.dmlp.org/omln500 (noting that a disproportionate number of litigation matters referred by an online legal referral group for journalists were individuals or those reporting on business or consumer matters). Deterring these speakers negatively impacts the media ecosystem as a whole; websites like the defendant's here are important elements of modern news and information dissemination, and can often serve as mechanisms for bringing stories to larger audiences and national media. *See* Yochai Benkler et al., *Social Mobilization and the Networked Public Sphere: Mapping the SOPA-PIPA Debate* 41-44 (2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?

abstract_id=2295953 (noting the role of smaller and more niche publications to surface stories later covered by national media).

These speakers depend on robust, durable, and predictable legal protections for their speech, including the fair report privilege, the doctrine of opinion based on disclosed facts, and the constitutional requirement of fault in defamation actions. These doctrines, and the clear legislative preference to protect journalists embodied in anti-SLAPP law, *see Lafayette Morehouse, Inc. v. Chronicle Publ'g Co.*, 37 Cal. App. 4th 855, 862-64 (1995), are completely frustrated, however, if a plaintiff is allowed to roughly allege that some statements on a website are defamatory, file a series of declarations that obscure what statements are actually at issue, and thus survive an anti-SLAPP motion to strike. *See* Petition 19-20. Ensuring that plaintiffs must actually plead what statements are at issue ensures that journalists and activists are allowed to continue their work.

II. Weakening Anti-SLAPP Standards in Cases Involving Anonymous Speech is Contrary to the Intent of the California State Legislature and Inconsistent with Anonymous Speech's Important Role in Public Discourse.

The Constitution affords great protection to anonymous speech, and courts have repeatedly acknowledged the important role it plays in public discourse dating back to the anonymous pamphleteers at the founding of the United States. *See, e.g.*, *Talley v. California*, 362 U.S. 60, 64 (1960) ("Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind."); *Digital Music News LLC v. Superior Court*, 226 Cal. App. 4th 216, 229 (2014) ("The use of a pseudonymous screen name offers a safe outlet for the user to experiment with novel ideas, express unorthodox political views, or criticize corporate or individual behavior without fear of intimidation or reprisal." (quoting *Krinsky v. Doe 6*, 159 Cal. App. 4th 1154, 1162 (2008)). As the United States Supreme Court has noted previously, "[u]nder our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and dissent." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 344, 357 (1995). And "although the Internet is the latest platform for anonymous speech, online speech stands on the same footing as other speech – there is no basis for qualifying the level of First Amendment scrutiny that should be applied to online speech." *Doe v. Harris*, No. 13-15263, slip op. at 18 (9th Cir. Nov. 18, 2014) (quoting *In re Anonymous Online Speakers*, 611 F.3d 1168, 1179 (9th Cir. 2011); *Reno v. ACLU*, 521 U.S. 844, 870 (1997)) (internal quotation marks omitted).

The ability to speak anonymously is essential for reporting and advocacy in conflict-torn international environments. Examples of this sort of reporting are too numerous to fully describe but include the following:

- In Mexico, a major source of news concerning drug-related violence in the northern part of the country for a time was a social media user known only as "Valor Por Tamaulipas" or "VxT." A drug cartel is reported to have offered an award of tens of thousands of dollars for information leading to the identity of VxT. *See* Tlanonotsalistli, *Mexico: Another Voice Goes Silent*, Global Voices Advocacy (April 19, 2013), http://advocacy.globalvoicesonline.org/2013/ 04/19/mexico-another-voice-goes-silent/.

- Iranian journalist Fred Petrossian wrote under the pseudonym "Hamid Tehrani" for years as means to protect his safety while publishing news of major Iranian events to a global audience. *See Fred Petrossian*, Global Voices, http://globalvoicesonline.org/author/hamid-tehrani/ (last visited Dec. 4, 2014).

- In China, anonymous practitioners of Falun Gong and online writers have called out the U.S. company Cisco Systems for its role in providing technological assistance to the Chinese government in its efforts to monitor and censor civilians. Deji Olukotun, *Human Rights Verdict Could Affect Cisco in China*, Global Voices Advocacy (April 24, 2013), http://advocacy.globalvoicesonline.org/2013/04/24/human-rights-verdict-could-affect-cisco-in-china/.

- In Pakistan, an organization only known as "Queer Pakistan" reported on the treatment of LGBTQ communities in the country, until the government of Pakistan blocked the website. Solana Larsen, *Queer Pakistan is Blocked: Double-Edged Sword of Media Coverage?*, Global Voices Advocacy (Sept. 25, 2013), http://advocacy.globalvoicesonline.org/2013/09/25/queer-pakistan-is-blocked-double-edged-sword-of-media-coverage/.

The practice of reporting on international issues has a unique relationship with the State of California, because nearly all of the major online platforms for speech are based in the state. From social media networks such as Facebook and Twitter, to blog and website hosting services such as Weebly and WordPress, many of the world's most prominent, widely used, and influential platforms for speech are housed in California.

The effects of California lawsuits that threaten to disclose the identities of speakers, however, are not confined to the state. As numerous courts have noted, litigation is often not the desired end. Instead, "after obtaining the identity of an anonymous critic through [discovery], a defamation plaintiff . . . can simply seek revenge or retribution." *Doe v. Cahill*, 884 A.2d 451, 457 (Del. 2005); *see McIntyre*, 514 U.S. at 341-42 (noting the decision in favor of anonymity "may be motivated by fear of economic or official retaliation"). Such revenge, especially in countries that respect neither the freedom of the press nor the rule of law, can

be truly devastating. In order for the First Amendment protections for anonymous speech to have substance, "[p]eople who have committed no wrong should be able to participate online without fear that someone who wishes to harass or embarrass them can file a frivolous lawsuit and thereby gain the power of the court's order to discover their identities." *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573, 578 (N.D. Cal. 1999).

The California Legislature has also indicated its desire to protect anonymous speech online by ensuring that anonymous speakers have the standing to challenge attempts to discover their identity through actions in California. Cal. Code Civ. P. § 1987.1. As the legislature noted when it enacted this bill, the law "is designed to prevent the chilling effect on robust free expression on the [I]nternet that can result from abusive and retaliatory threats of litigation directed at a speaker or publisher. When a person in an online forum exercises the right to anonymous free speech, especially on a controversial subject of public concern, the target of a criticism or an organization that finds the speech undesirable may seek to intimidate the speaker into silence with faulty claims of defamation . . . ." California Bill Analysis, Assembly Floor Analysis, 2007-08 Regular Session, Assembly Bill 2433 (comments of bill author Paul Krekorian). This echoes the stated purpose of anti-SLAPP law itself, which is to stop lawsuits that "chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." Cal. Code Civ. P. § 425.16(a).

The decision below contradicts this history and precedent. Prior to this decision, courts consistently required defamation plaintiffs to substantiate claims of actual malice in order to survive an anti-SLAPP motion to strike. *See Robertson*, 36 Cal. App. 4th at 359 ("[S]ection 425.16, by requiring scrutiny of the supporting and opposing affidavits . . . calls upon the plaintiff to meet the defendant's constitutional defenses, such as lack of actual malice."); *accord Stewart v. Rolling Stone LLC*, 181 Cal. App. 4th 664, 689-90 (2010); *Conroy v. Spitzer*, 70 Cal. App. 4th 1446, 1451-52 (1999). This helps complete and effectuate the intent of anti-SLAPP law. The constitutional requirement of fault in defamation actions is the safeguard that ensures freedom of speech remains "uninhibited, robust, and wide-open," *New York Times v. Sullivan*, 376 U.S. 254, 271 (1964), and thus cannot be omitted from defamation analysis, *see Obsidian Finance Grp., LLC v. Cox*, 740 F.3d 1284, 1289-92 (9th Cir. 2014).

Here the plaintiff was allowed to escape an essential factual showing even though it ignored a mechanism that would have allowed the court below to consider granting limited discovery during the anti-SLAPP process. *See* Cal. Code Civ. P. § 425.16(g). Had the plaintiff sought such limited discovery, the court would then have been empowered to consider the strength of the plaintiff's claim as it stood and determine whether discovery would be warranted, or whether the lawsuit was simply a pretext to identify an anonymous speaker. *See Paterno v. Superior Court*, 163 Cal. App. 4th 1342, 1349 (2008) (noting that the anti-SLAPP procedure

"reinforces the self-executing protections of the First Amendment" in anonymous speech cases, citing *Krinsky*, 159 Cal. App. 4th 1154).

This sort of delicate balancing is the appropriate vehicle for resolving the tension between the right of anonymous speech and a plaintiff's ability to explore the validity of a claim. The decision of the Court of Appeal opted instead to put all anonymous speech on a weaker footing than other speech, and thus more vulnerable to litigation after an anti-SLAPP motion, for no principled reason. Such a decision is directly contrary to the treasured position of anonymous speech under the First Amendment and the essential role it plays in facilitating reporting from all corners of the globe.

III. Conclusion.

For the reasons above, *Amici* respectfully request that this Court grant the petition to review in *Wineland-Thomson Adventures, Inc. v. Doe 1*, and clarify that defamation actions may only survive a motion to strike under California's anti-SLAPP law if they state and substantiate a fully valid claim.

Respectfully submitted,

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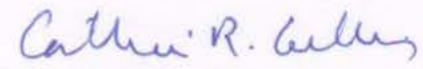
By and through local counsel,



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[3] *Amici* wish to thank Harvard Law School Cyberlaw Clinic student Shane Anderson for his invaluable contributions to this letter.

Proof of Service

Wineland-Thomson Adventures, Inc. v. Doe 1
Court of Appeal Case No. A140537, San Francisco Superior Court Case No. CGC-13-528871

I declare at the time of service I was over 18 years of age and not a party to this action. My address is 150 Harbor Drive #2477, Sausalito, California, 94965.

On **December 5, 2014**, I served the following document:

AMICUS LETTER ON BEHALF OF GLOBAL VOICES ADVOCACY AND THE MEDIA LEGAL DEFENCE INITIATIVE IN SUPPORT OF PETITION FOR REVIEW

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on **December 5, 2014**, at Sausalito, California.

Catherine R. Gellis

Catherine R. Gellis